

2010

# State of Utah v. Eddie G. Kucharski : Brief of Appellant

Utah Court of Appeals

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Scott L. Wiggins; Arnold and Wiggins, P.C.; Counsel for Appellant.

Mark L. Shurtleff; Utah Attorney General; Laura B. Dupaix; Assistant Attorney General; Counsel for Appellee.

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, )  
 ) Case No. 20100283-CA  
Plaintiff / Appellee, )  
 )  
v. )  
 )  
EDDIE G. KUCHARSKI, )  
 )  
Defendant / Appellant. )

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BRIEF OF APPELLANT

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Appeal from Sentence Review entered March 9, 2010, in the Second  
District Court, Davis County, the Honorable Thomas L. Kay,  
presiding

---

SCOTT L WIGGINS (5820)  
ARNOLD & WIGGINS, P.C.  
American Plaza II, Suite 105  
57 West 200 South  
Salt Lake City, UT 84101  
*Counsel for Appellant*

MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL  
LAURA B. DUPAIX  
ASSISTANT ATTORNEY GENERAL  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854  
*Counsel for Appellee*

**FILED**  
**UTAH APPELLATE COURTS**

**FEB -8 2011**

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STATE OF UTAH,	)	
	)	Case No. 20100283-CA
Plaintiff / Appellee,	)	
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v.	)	
	)	
EDDIE G. KUCHARSKI,	)	
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Defendant / Appellant.	)	

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ARNOLD & WIGGINS, P.C.  
American Plaza II, Suite 105  
57 West 200 South  
Salt Lake City, UT 84101  
*Counsel for Appellant*

MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL  
LAURA B. DUPAIX  
ASSISTANT ATTORNEY GENERAL  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854  
*Counsel for Appellee*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES. . . . .	iv
STATEMENT OF JURISDICTION. . . . .	1
STATEMENT OF ISSUES / STANDARDS OF REVIEW. . . . .	1
DETERMINATIVE AUTHORITY. . . . .	1
STATEMENT OF THE CASE. . . . .	2
STATEMENT OF FACTS . . . . .	3
SUMMARY OF ARGUMENTS . . . . .	7
ARGUMENTS	
I.    TRIAL COUNSEL DENIED MR. KUCHARSKI OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST THE DISQUALIFICATION OF THE SENTENCING JUDGE FOR ACTUAL BIAS OR PREJUDICE. . . . .	9
A.    Ineffective Assistance of Counsel . . . . .	9
B.    Recusal or Disqualification . . . . .	11
CONCLUSION . . . . .	17
ADDENDA . . . . .	19
Addendum A:    Objection to Presentence Report (R. 140-50)	
Addendum B: <i>State v. Kucharski</i> , 2009 UT App 295 (Memorandum Decision) (per curiam)	
Addendum C:    Sentence Review hearing transcript (R. 278)	
Addendum D:    Minutes Sentence Review (R. 259)	

## TABLE OF AUTHORITIES

### CASES CITED

Page(s)

#### Federal Cases

<i>Bell v. Cone</i> , 535 U.S. 685, 122 S.Ct. 1843 (2002).....	10,17
<i>Lockhart v. Fretwell</i> , 506 U.S. 364, 113 S.Ct. 838 (1993).....	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984).....	9,10,11

#### State Cases

<i>Bundy v. DeLand</i> , 763 P.2d 803 (Utah 1988).....	1,9
<i>Haslam v. Morrison</i> , 113 Utah 14, 190 P.2d 520 (1948).....	16
<i>Menzies v. Galetka</i> , 2006 UT 81, 150 P.3d 480.....	10
<i>Parsons v. Barnes</i> , 871 P.2d 516 (Utah), cert. denied, 513 U.S. 966, 115 S.Ct. 431 (1994).....	11
<i>State v. Bullock</i> , 791 P.2d 155 (Utah 1989), cert. denied, 497 U.S. 1024, 110 S.Ct. 3270 (1990).....	10
<i>State v. Frame</i> , 723 P.2d 401 (Utah 1986).....	11
<i>State v. Gardner</i> , 789 P.2d 273 (Utah 1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1837 (1990).....	12
<i>State v. Maestas</i> , 1999 UT 32, 984 P.2d 376.....	1
<i>State v. Neeley</i> , 748 P.2d 1091 (Utah), cert. denied, 487 U.S. 1220, 108 S.Ct. 2876 (1988).....	12,13,15
<i>State v. Perry</i> , 899 P.2d 1232 (Utah Ct. App. 1995).....	9
<i>State v. Robertson</i> , 2005 UT App 419, 122 P.3d 895.....	1
<i>State v. Strain</i> , 885 P.2d 810 (Utah Ct. App. 1994).....	1

<i>State v. Templin</i> , 805 P.2d 182 (Utah 1990).....	10,11
<i>State v. Wright</i> , 893 P.2d 1113 (Utah Ct. App. 1995).....	10

#### STATUTES CITED

Utah Code Ann. § 78A-4-103(2)(e).....	1
---------------------------------------	---

#### COURT RULES CITED

Utah Code of Judicial Conduct 3(C)(1)(b) (1981).....	12
Utah Code of Judicial Conduct 3E(1)(a) (2009).....	12
Utah Code of Judicial Conduct Rule 2.11(A)(1)(a) (2010).....	12
Utah R. Crim. P. 29.....	7,8,11,12,16

#### CONSTITUTIONAL PROVISIONS CITED

U.S. Const. amend. VI.....	1,7,9
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### STATEMENT OF JURISDICTION

The Utah Court of Appeals is conferred with jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78A-4-103(2)(e).

### STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether trial counsel denied Mr. Kucharski of his Sixth Amendment right to the effective assistance of counsel by failing to request the disqualification of the sentencing judge for actual bias or prejudice. To make such a showing, a defendant must show, first, that counsel rendered a deficient performance, falling below an objective standard of reasonable professional judgment, and, second, that counsel's performance was prejudicial. *Bundy v. DeLand*, 763 P.2d 803 (Utah 1988). The appellate court reviews such a claim as a matter of law. *State v. Robertson*, 2005 UT App 419, ¶5, 122 P.3d 895; *State v. Maestas*, 1999 UT 32, ¶20, 984 P.2d 376; *State v. Strain*, 885 P.2d 810, 814 (Utah Ct. App. 1994).

#### Preservation of Issue Citation or Statement of Grounds for Review:

Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

### DETERMINATIVE AUTHORITY

U.S. Const. amend. VI.....1,7,9

The constitutional provisions, statutes, ordinances, rules, regulations, or case law whose interpretation is determinative, if any, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Brief of Appellant.

#### STATEMENT OF THE CASE

Defendant, on October 25, 2005, appeared with appointed trial counsel before the district court pursuant to a negotiated plea and entered a plea of no contest to Communications Fraud, a third-degree felony. The trial court directed that a presentence investigation report (PSI) be prepared for sentencing.

Prior to sentencing, Defendant, through counsel, filed an Objection to the Presentence Report. At sentencing, without addressing the objections to the PSI, the district court sentenced Defendant to an indeterminate term of zero to five years in the Utah State Prison. Defendant appealed.

On appeal, Defendant, among other things, argued that the district court erred by failing to resolve alleged inaccuracies in the PSI, which error the State conceded. This Court, by way of Memorandum Decision issued October 16, 2009, remanded the case for the sentencing judge to consider the objections to the PSI and make findings as to whether the information objected to was



accurate and then determine whether the information is relevant to sentencing.

On remand, Defendant's appointed trial counsel appeared on March 4, 2010, for a Sentence Review hearing to address the numerous objections. After the hearing, the court refused to revise the sentence.

The district court signed the Minutes Sentence Review on March 9, 2010. Defendant filed a timely Notice of Appeal on April 2, 2010.

#### STATEMENT OF FACTS

1. On October 25, 2005, Defendant appeared with appointed trial counsel before the district court pursuant to a negotiated plea and entered a plea of no contest to Communications Fraud, a third-degree felony (R. 28-32).

2. The trial court directed that a presentence investigation report (PSI) be prepared for sentencing (R. 279:58-59).

3. Prior to sentencing, Defendant, through counsel, filed an Objection to the Presentence Report (R. 140-50). See Objection to Presentence Report, R. 140-50, a true and correct copy of which is attached to this Brief as Addendum A.

4. At sentencing, without addressing the objections to the PSI, the district court sentenced Defendant to an indeterminate term of zero to five years in the Utah State Prison (R. 279:80-81).

5. Defendant appealed (R. 173-74).

6. On appeal, Defendant argued, among other things, that the district court erred by failing to resolve alleged inaccuracies in the PSI, which error the State conceded (R. 229).

7. By way of Memorandum Decision (Not For Official Publication) issued October 16, 2009, this Court remanded the case for the sentencing judge to consider the objections to the PSI and make findings as to whether the information objected to was accurate and then determine whether the information is relevant to sentencing (*Id.* at 229-30). See *State v. Kucharski*, 2009 UT App 295 (Memorandum Decision) (per curiam) (R. 228-31), a true and correct copy of which is attached to this Brief as Addendum B.

8. On remand, Defendant's appointed trial counsel raised numerous inaccuracies in the PSI at the Sentence Review hearing on March 4, 2010 (R. 278).

9. The following exchange occurred at the outset of the hearing on March 4, 2010, in which trial counsel raised one of the inaccuracies in the PSI:

THE COURT: Okay. You still talking about the attitude orientation paragraph?

MS. GEORGE: Yes, your Honor.

THE COURT: Well, I'm going to tell you, counsel, and I don't have any disrespect for you, but I can tell you that we've been through this. I've had Mr. Kucharski on a case before this case, and I've had more stories that I have heard that he has been rebutted by a bunch of other people that he's plead guilty to and then he comes back and gets a new attorney and then he basically says all the same old stories again.

MS. GEORGE: Yes, your Honor.

THE COURT: And so if you want to go through all these this way, I'm more than happy to do it, but I made my ruling on that. I'm required to make the finding. I made a finding and I'm not going to have things reargued.

MS. GEORGE: And I understand that, your Honor. My concern is just then I'm put in a position as his current counsel where Mr. Kucharski wanted these issues addressed. If I don't address them then I too am --

THE COURT: I'm not faulting you for addressing them. I'm just telling you what's the history.

MS. GEORGE: Yes, your Honor.

THE COURT: -- of this case and previous cases.

(R. 278:12:2-24). See Sentence Review hearing transcript, R. 278, a true and correct copy of which is attached to this Brief as Addendum C.<sup>1</sup>

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<sup>1</sup>A copy of the Sentence Review hearing transcript is also contained in the record at R. 275.

10. At the conclusion of the hearing, the district court in the course of determining whether to revise the sentence, stated the following:

What I would say in response to what we have done today is all of these changes that you've made, even if you want to take out the attitude and orientation change, the problem with this case and the problem that I didn't go along with what the plea was, was because Mr. Kucharski had had a history with me. And that paragraph under investigator comment, the second paragraph, the first sentence, the defendant has established instances of repetitive criminal conduct and continued criminal behavior.

And that was the issue that was critical. And it was the issue that he was going from company to company, doing similar types of crime, and basically thinking he could get away with it. That more than anything else -- it wasn't the dog license failure. It really wasn't anything about the -- other than the record that I had had with him. And despite what the recommendation was by the county or the defendant was that he deserved to go to prison because of the continued behavior. Probation hadn't changed him in the past under supervised probation, and he continued to commit crimes.

And so I'm stating as a matter of fact and law that all the inaccuracies that have been addressed here that I have agreed to and agreed to what Mr. Kucharski said would not and will not change the sentence that I gave him to go to zero to five years in prison. So I do not see any reason to revise the sentence because those things did not affect it.

(R. 278:36-37).

11. The district court signed the Minutes Sentence Review on March 9, 2010, which was accordingly entered that same day (R.

259). See Minutes Sentence Review , R. 259, a true and correct copy of which is attached to this Brief as Addendum D.

12. Defendant filed a timely Notice of Appeal on April 2, 2010 (R. 260-63).

#### SUMMARY OF ARGUMENTS

1. Trial counsel denied Mr. Kucharski of his Sixth Amendment right to the effective assistance of counsel by failing to request the disqualification of the sentencing judge for actual bias or prejudice. In the course of this sentence review proceeding, Defendant's trial counsel learned or with the exercise of reasonable diligence should have realized the bias or prejudice grounds upon which to move for disqualification of Judge Kay in the instant case. Trial counsel, by failing to request the disqualification, rendered ineffective assistance of counsel.

This failure fell below an objective standard of reasonable professional judgment, which is demonstrated by existing Utah case law concerning the standard for disqualification, including the Code of Judicial Conduct, as previously discussed, Utah Rule of Criminal Procedure 29, and the judge's comments demonstrating actual bias or prejudice in this case.

The comments made by Judge Kay in the instant case demonstrate actual bias or prejudice against Defendant. Had trial

counsel moved for disqualification, there is a reasonable likelihood, based on Judge Kay's comments, that a recusal would have occurred or that another judge would have been assigned to the case. But, due to the failure to file such a motion, Defendant was precluded from even having the disqualification matter duly considered.

Just prior to the initial comments of actual bias being made, the judge had essentially refused to make a change to the PSI because he simply did not believe the facts as Defendant attempted to present them to the court. Moreover, the judge, after making numerous corrections to the PSI, determined, as a matter of course, that the inaccuracies would not and will not change the sentence the court previously imposed. The comments of actual bias in the instant case cast a shadow of suspicion on the fairness and consideration given to the inaccuracies presented to the court.

Trial counsel's failure to move for disqualification cannot, under the circumstances of the case, be considered sound trial strategy. The judge's comments demonstrated actual bias or prejudice against Defendant -- and there was nothing detrimental to Defendant in moving for such a disqualification as dictated by Rule 29. Based on the actual bias or prejudice shown and the circumstances of this case, but for counsel's unprofessional

errors, there is a reasonable probability that the results of the sentence review would have been different. Consequently, because both prongs of the test have been established, the proceeding is inherently unreliable and the result cannot stand.

### ARGUMENTS

I. TRIAL COUNSEL DENIED MR. KUCHARSKI OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST THE DISQUALIFICATION OF THE SENTENCING JUDGE FOR ACTUAL BIAS OR PREJUDICE.

A. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), the United States Supreme Court established a two-prong test for determining when a defendant's Sixth Amendment<sup>2</sup> right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. This two-pronged test - adopted by Utah courts - requires a defendant to show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant." *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App.

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<sup>2</sup>The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," or, in this case, a fair sentencing. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993). Consequently, if a defendant meets both prongs of the test, "then the proceeding is inherently unreliable and the result cannot stand." See *Bell v. Cone*, 535 U.S. 685, 695, 122 S.Ct. 1843 (2002).

To satisfy the first prong of the test, a defendant must "'identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). A defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), cert. denied, 497 U.S. 1024, 110 S.Ct. 3270 (1990). "[T]o overcome this presumption," the defendant "must demonstrate that the challenged actions cannot be considered sound strategy under the circumstances. *Menzies v. Galetka*, 2006 UT 81, ¶89, 150 P.3d 480 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2052).



To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986).

#### **B. Recusal or Disqualification**

Rule 29 of the Utah Rules of Criminal Procedure provides in part:

A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias or prejudice, or conflict of interest.

Utah R. Crim. P. 29(c)(1)(A). According to the rule, the motion must be filed "after commencement of the action, but not later than 20 days after the last of the following:" [1] "assignment of the action or hearing to the judge; [2] appearance of the party or the party's attorney; or [3] the date on which the moving party learns or with the exercise of reasonable diligence should have

learned of the grounds upon which the motion is based." See Utah R. Crim. P. 29(c)(1)(B)(i)-(iii).

Upon the filing of the motion, the judge, who is the subject of the motion and affidavit, "shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge." See Utah R. Crim. P. 29(c)(2). Thereafter, "[t]he judge shall take no further action in the case until the motion is decided." *Id.*

In *State v. Neeley*, 748 P.2d 1091 (Utah), *cert. denied*, 487 U.S. 1220, 108 S.Ct. 2876 (1988), the Utah Supreme Court stated that a trial judge "should recuse himself when his 'impartiality' might reasonably be questioned." *Id.* at 1094 (citing Utah Code of Judicial Conduct 3(C)(1)(b) (1981));<sup>3</sup> see also *State v. Gardner*, 789 P.2d 273, 278 (Utah 1989), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1837 (1990) (emphasizing that "[n]othing is more damaging to the public confidence in the legal system than the appearance of bias or prejudice on the part of the judge."). This standard, according to the Court, "should be given careful consideration by

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<sup>3</sup>See Utah Code of Judicial Conduct 3E(1)(a) (2009) applicable to the instant case. For information purposes only, the Code of Judicial Conduct was repealed and reenacted effective April 1, 2010. The new Code is based on the ABA Model Code issued in 2007. The provision cited in *State v. Neeley*, 748 P.2d 1091, 1094 (Utah), *cert. denied*, 487 U.S. 1220, 108 S.Ct. 2876 (1988), is currently located in Rule 2.11(A)(1)(a) of the new Utah Code of Judicial Conduct.

the trial judge." Neeley, 748 P.2d at 1094. "It may require recusal in instances where no actual bias is shown." *Id.*

Throughout the proceeding on remand in the instant case, the district court demonstrated actual bias or prejudice against Defendant through various comments concerning Defendant. For example, the court's bias or prejudice was demonstrated by the following exchange at the outset of the hearing on March 4, 2010, in which the trial counsel raised one of several inaccuracies in the PSI:

THE COURT: Okay. You still talking about the attitude orientation paragraph?

MS. GEORGE:<sup>4</sup> Yes, your Honor.

THE COURT: Well, I'm going to tell you, counsel, and I don't have any disrespect for you, but I can tell you that we've been through this. I've had Mr. Kucharski on a case before this case, and I've had more stories that I have heard that he has been rebutted by a bunch of other people that he's plead guilty to and then he comes back and gets a new attorney and then he basically says all the same old stories again.

MS. GEORGE: Yes, your Honor.

THE COURT: And so if you want to go through all these this way, I'm more than happy to do it, but I made my ruling on that. I'm required to make the finding. I made a finding

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<sup>4</sup>The district court appointed Ms. Julie George as appointed trial counsel for the purpose of the proceedings on remand (R. 276:9:21-22).

and I'm not going to have things reargued.

MS. GEORGE: And I understand that, your Honor. My concern is just then I'm put in a position as his current counsel where Mr. Kucharski wanted these issues addressed. If I don't address them then I too am --

THE COURT: I'm not faulting you for addressing them. I'm just telling you what's the history.

MS. GEORGE: Yes, your Honor.

THE COURT: -- of this case and previous cases.

(R. 278:12:2-24). Additionally, at the conclusion of the hearing on March 4, 2010, the district court in the course of determining whether to revise the sentence, stated the following:

What I would say in response to what we have done today is all of these changes that you've made, even if you want to take out the attitude and orientation change, the problem with this case and the problem that I didn't go along with what the plea was, was because Mr. Kucharski had had a history with me. And that paragraph under investigator comment, the second paragraph, the first sentence, the defendant has established instances of repetitive criminal conduct and continued criminal behavior.

And that was the issue that was critical. And it was the issue that he was going from company to company, doing similar types of crime, and basically thinking he could get away with it. That more than anything else -- it wasn't the dog license failure. It really wasn't anything about the -- other than the record that I had had with him. And despite what the recommendation was by the county or the defendant was that he deserved to go to prison because of the continued behavior. Probation hadn't changed him in the past under supervised probation, and he continued to commit crimes.

(R. 278:36-37).

In the course of this sentence review proceeding, Defendant's trial counsel learned or with the exercise of reasonable diligence should have realized the bias or prejudice grounds upon which to move for disqualification of Judge Kay in the instant case. By failing to request the disqualification, trial counsel rendered ineffective assistance of counsel. Trial counsel's failure fell below an objective standard of reasonable professional judgment, which is demonstrated by existing Utah case law concerning the standard for disqualification, including the Code of Judicial Conduct, as previously discussed, Utah Rule of Criminal Procedure 29, and the comments demonstrating actual bias or prejudice in this case.

The Utah Supreme Court, in *Neeley*, addressed reversible error based on a trial judge's failure to recuse, stating:

But, while we recommend the practice that a judge recuse himself where there is a colorable claim of bias or prejudice, absent a showing of actual bias or an abuse of discretion, failure to do so does not constitute reversible error as long as the requirements of [Utah R. Crim. P. 29] are met.

*Neeley*, 748 P.2d at 1094-95. In the instant case, the comments made by Judge Kay demonstrate actual bias or prejudice against Defendant. Had trial counsel moved for disqualification, there is a reasonable likelihood, based on Judge Kay's comments, that a

recusal would have occurred or that another judge would have been assigned to the case. But, due to the failure to file such a motion, Defendant was precluded from even having the disqualification matter duly considered.

Of particular note is the fact that just prior to the initial comments of actual bias being made, the judge had essentially refused to make a change to the PSI because he simply did not believe the facts as Defendant attempted to present them to the court (R. 278:10-11). Moreover, the judge, after making numerous corrections to the PSI, determined, as a matter of course, that the inaccuracies "would not and will not change the sentence that I gave him . . . ." (R. 278:37:6-11). The comments of actual bias in the instant case cast a shadow of suspicion on the trial judge's fairness and consideration given to the inaccuracies presented by Defendant to the court. *See Haslam v. Morrison*, 113 Utah 14, 20, 190 P.2d 520 (1948).

Trial counsel's failure to move for disqualification cannot, under the circumstances of the case, be considered sound trial strategy. The judge's comments demonstrated actual bias or prejudice against Defendant -- and there was nothing detrimental to Defendant in moving for such a disqualification as dictated by Rule 29. Based on the actual bias or prejudice shown and the circumstances of this case, but for counsel's unprofessional

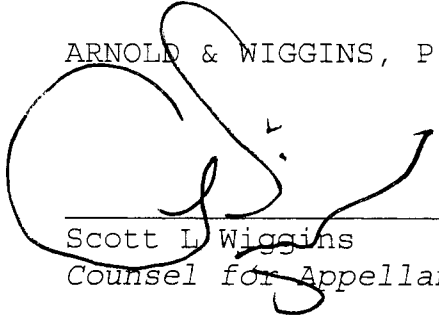
errors, there is a reasonable probability that the results of the sentence review would have been different. Because both prongs of the test have been established, the proceeding is inherently unreliable and the result cannot stand. See *Bell v. Cone*, 535 U.S. 685, 695, 122 S.Ct. 1843 (2002).

#### CONCLUSION

Based on the foregoing, Mr. Kucharski respectfully requests that this Court set aside Judge Kay's review of his sentence in the instant case and remand the case for further proceedings consistent with this Court's decision.

RESPECTFULLY SUBMITTED this 4th day of February, 2011.

ARNOLD & WIGGINS, P.C.



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Scott L. Wiggins  
Counsel for Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following on this 8 day of February, 2011:

Ms. Laura B. Dupaix  
Assistant Attorney General  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854  
*Counsel for the State of Utah*



\_\_\_\_\_  
Scott L. Wiggins



## ADDENDA

- Addendum A: Objection to Presentence Report (R. 140-50)  
Addendum B: *State v. Kucharski*, 2009 UT App 295  
(Memorandum Decision) (per curiam)  
Addendum C: Sentence Review hearing transcript (R. 278)  
Addendum D: Minutes Sentence Review (R. 259)

Tab A

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MAR 13 2007

Layton District Court

Nathan N. Jardine, USB No. 8215  
The Law Offices of Nathan N. Jardine  
39 Exchange Place, Suite 100  
Salt Lake City, Utah 84111  
Telephone: 801/994-9985  
Fax: 801/519-8745

Attorney for Defendant, Eddie G. Kucharski

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY

FARMINGTON DEPARTMENT, STATE OF UTAH

State of Utah

Plaintiff,

vs.

Eddie Kucharski

Defendant

Objection to Presentence Report

Case No. 04-1701630

Judge Thomas L. Kay

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that Eddie Kucharski by and through his attorney of record, Nathan N. Jardine, hereby objects to the Presentence Report dated February 16, 2007, for the following reasons:

1. On page 2, the second full paragraph, the Presentence Report indicates that Eddie Kucharski purchased a vehicle with a \$38,000.00 bad check. Mr. Kucharski relates that in June or July of 2007, he purchased a vehicle from Quality Dodge in Tooele, Utah. At the time he purchased the vehicle, he issued a check with the understanding that the check would not be cashed until Mr. Kucharski received funds from a sponsor. Eddie Kucharski is the manager/owner of H&K Motor Sports. H&K Motor Sports is involved in the Nascar team business. Mr. Kucharski's business owns several different race

Objection to presentence report



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041701630 KUCHARSKI, EDDIE G

cars and teams. Mr. Kucharski believed at the time that the check was issued that he would be able to have the \$38,000.00 within a three-week time frame because he anticipated the money coming in from one of the sponsors of one of his teams. Mr. Kucharski was arrested while they were awaiting for the money to come in from the sponsor. The car dealership understood the dynamics of this situation and breached his agreement by cashing the check which is why, in part, the matter was dismissed.

2. Mr. Kucharski indicates that at the first court appearance in this matter the prosecution told him that they were in the process of dismissing the matter. Three weeks later, the matter was dismissed. The car dealer was not out any money whatsoever due to the fact that Mr. Kucharski paid him for depreciation on the car. The statement in the Presentence Report that the district attorney had to actually file felony charges in order for the defendant to agree to return the vehicle is incorrect and inaccurate.

3. Defendant objects to the second full paragraph on page 2 of the Presentence Report which starts "Attitude-Oriented." In that paragraph, the Presentence Report indicates "The defendant's explanation of the offense is completely contradictory to that of his victim and to the employer he exploited." Eddie Kucharski believes that he did not exploit his employer. This offense arose from a situation where Eddie Kucharski worked for Champion Windows and Patios (Champion). He agreed with the manager of Champion, Greg Shunoway, that he could do some window jobs on the side. Greg Shunoway agreed that Eddie Kucharski could do the window jobs with the only stipulation that they purchased the windows from Champion. One of the people that Eddie Kucharski agreed that he would do a window job for was a person by the name of Lanny Hansen who is the victim in this case. Eddie

Kucharski agreed with Lanny Hansen that he would do the window job for Lanny Hansen. He took a deposit from Lanny Hansen. He asked Greg Shunoway to order the windows, but Greg Shunoway never ordered the windows. Consequently, Eddie Kucharski could not install the windows in Lanny Hansen's home. As a result of the windows not being installed, Lanny Hansen was unhappy and made a criminal complaint against Eddie Kucharski. Eddie Kucharski then has had to face the criminal charges. The employer in this matter, Champion, was not exploited. In fact, the employer wronged Eddie Kucharski.

4. It is Eddie Kucharski's understanding that both he and Champion were sued as a result of the problem. Eddie Kucharski was informed by Brett Klackston that Champion had actually cut a check to Lanny Hansen in settlement of the matter.

5. From the day that Eddie Kucharski received the service of a lawsuit, until the day that he was supposed to be sentenced last year, he indicates that he was in negotiations with the civil attorney for Lanny Hansen in order to resolve the matter. He offered to install windows from a different company and he offered to make substantial payments since he no longer had the deposit given him by Lanny Hansen, but nothing was ever finalized between himself and Lanny Hansen's attorney.

6. On page 2, the second sentence of the "Attitude-Orientations" paragraph, the Presentence Report Investigator indicates "He claims to have 'returned the deposit' in his statement of the offense." The fact of the matter is that a careful reading of the defendant's statement of the offense could lead to the conclusion that when Eddie Kucharski indicated that he "returned the deposit" he was talking about the deposit for a different job, not the job related to the Lanny Hansen order.

As a matter of clearing up the Presentence Report, Eddie Kucharski hereby informs the court that at the time that he took on the job for Lanny Hansen, he also took on a patio job for a person by the name of Greg Williams. At the same time he was doing the job for Greg Williams he found out that he couldn't get the materials through Champion. As a result of that he couldn't get the materials so at that point Eddie Kucharski returned the deposit on the patio job for Greg Williams but he couldn't return the deposit on the window job for Lanny Hansen because Greg Shunoway was still indicating at that point that the windows were going to be forthcoming, but they never were. In any event, there is a statement in the Presentence Report that indicates he claims to have "returned the deposit." The reality is that when Eddie Kucharski claims to return the deposit, he was talking about the deposit to Greg Williams for the patio job, not the deposit to Lanny Hansen for the window job.

7. In the fourth sentence of the Attitude-Oriented paragraph, the Presentence Report Investigator indicates "The defendant actually tries to absolve himself from full responsibility by placing blame on his manager at the time." Even in Eddie Kucharski's statement, he indicates that he feels bad, "I feel horrible that Lanny lost money. That was never intended. . . . I am working two jobs to pay Lanny back." Obviously, Eddie Kucharski is not trying to absolve himself from full responsibility by placing blame on the manager at the time. Clearly, however, the manager was at fault. Eddie Kucharski indicates that the manager was fired, terminated from his job, due to the dealings that occurred with respect to this matter and for other similar reasons.

8. Eddie Kucharski disputes sentence 5 of the Attitude-Oriented paragraph of the Presentence

Report which indicates that "The fact is he never submitted the work order for the windows, insisted that the victim issue the checks directly to himself, and then cashed the checks through his personal checking account." The fact of the matter is that pursuant to the arrangement that Eddie Kucharski had with the manager at the time, Greg Shunoway, he was to tell Greg that there were windows and more materials that were needed, and Greg Shunoway was to order those windows or materials. Eddie Kucharski would then receive the materials and do the job on his own time. That was the arrangement that Eddie Kucharski had with his manager. It was a win-win situation for all. Champion would receive money for the materials that were ordered from them and Eddie Kucharski would make money on the side. However, there was never an arrangement between Eddie Kucharski and the manager of the store, Greg Shunoway, that he would submit a work order for the windows. That was not part of the arrangement. The Presentence Report makes it seem as though Eddie Kucharski should have issued a work order for the windows.

Of course, the victim, Lanny Hansen, was required to pay Eddie Kucharski directly for the work due to the fact that Eddie Kucharski was not working for Champion when he agreed to install the windows, rather he was working for himself as an independent contractor. Eddie Kucharski arranged for the windows and materials to be delivered from Champion and was going to perform the work himself. Of course, the victim was to pay him directly for the windows. Eddie Kucharski did not cash the payment for the windows through his personal checking account, in fact, Eddie Kucharski cashed the checks through Lanny Hansen's checking account. He just simply cashed the checks that were delivered

to him by his customer.

9. The last sentence in the Attitude-Orientation paragraph indicates "The defendant's attitude and orientation is to minimize his involvement in the offense. The fact of the matter is that the defendant's attitude is to clear up what actually occurred as far as the alleged offense was concerned. Eddie Kucharski knows and understands that he should not have spent the money that was given to him. He knows that it was a big mistake to use the money for his personal use when he should have reserved it to do the job for which he was hired. He recognizes that that was one of the biggest mistakes of his life due to the fact that he did not have the money to Lanny Hansen when Greg Shunoway failed to order the windows and the windows were never delivered. Eddie Kucharski has now spent 87 days in jail due to this matter.

The reason Eddie Kucharski was performing side jobs is because he needed extra money because his son had spent two weeks in the ICU and he had a huge hospital bill to pay. Additionally, Eddie Kucharski was being promoted in the company he worked for at the same time of the alleged events. The promotion involved a move to Dallas, Texas. The move was not being paid for by the company, so Eddie Kucharski used the money for hospital bills and moving expenses for his family. He recognizes, however, that he should not have used the money for anything except for performing the work for the customer who had paid him in advance for his services.

As Eddie Kucharski understands it, the work that he was going to do for Lanny Hansen was going to be done and that the materials were going to be paid for by Champion. Champion was going to be



11. Lanny Hansen has told Eddie Kucharski that he is recommending to the prosecutor and the court that no additional time be served by Eddie in this matter. Mr. Hansen knew that Eddie Kucharski was working independently from Champion when he agreed to do the work on Lanny Hansen's home. Mr. Hansen knew that was the reason he was getting the windows done at a discounted rate. Eddie Kucharski did not tell Lanny Hansen that the windows were a promotional deal as indicated on page 3, first full paragraph, sentence 3 of the Presentence Report. He did tell Lanny Hansen that he would do the work cheaper than he could get the work done through Champion. The amount of \$10,398.00 was paid to Eddie Kucharski by Lanny Hansen.

When Mr. Hansen contacted Eddie Kucharski, as indicated on page 3, in the first full paragraph of the Presentence Report, Eddie Kucharski did inform Mr. Hansen the work had been delayed because he had a family death in Dallas, Texas, and the delay was also caused by the fact that he hadn't received the windows from Champion yet.

Yet, the manager of Champion, Greg Shunoway, told Lanny Hansen that Eddie Kucharski had "possibly moved to Arizona", for the probable reason that Greg Shunoway wanted to cover up his own wrongdoing in the matter. As indicated above, ultimately, the manager, Greg Shunoway, was fired from his job for the dealings that he made in this instance as well as other instances similar to this incident. Of course, the manager of Champion never received a work order due to the fact that the work was not done through Champion, it was done through Eddie Kucharski.

Eddie Kucharski never submitted a work order to Champion. Eddie Kucharski did give Mr. Hansen a document which indicated the location and measurements of windows. Apparently, Mr. Hansen sent that document to Champion and was informed that the document was not valid. The Presentence Report also indicates on page 3, the second full paragraph, the last sentence, "Evidently the work order had a substantial amount of missing information." The fact of the matter is that there was never a work order that was submitted to Champion by Eddie Kucharski or from Mr. Hansen to Eddie Kucharski. It was only a work sheet where Eddie Kucharski worked out the size of the windows and the price he would need to install the windows.

12. With respect to the third full paragraph on page 3 of the Presentence Report, Eddie Kucharski

will provide documents to the court on the day of the sentencing in this matter which indicate that Eddie Kucharaki did not quit the company on May 27, 2006. In fact, he was transferred to Dallas, Texas on or about that date.

13. With respect to the fourth full paragraph on page 3 of the Presentence Report, Eddie Kucharaki never received any messages which were allegedly left by the police on his "active cell phone."

14. With respect to paragraph one under "CUSTODY STATUS" of the Presentence Report, defendant served 52 days in the Davis County Jail and an additional 30 days in Maricopa County, Arizona, and an additional 14 days in Tooele County on these charges.

15. With respect to paragraph "E. PROBATION/PAROLE HISTORY", the fact of the matter is that from 1999 through 2002, the defendant was having a very difficult time in his life. He went through a divorce and was suffering from the mental illness of bipolar disease which was untreated at the time. Many of the criminal offenses that are shown occurred from the same episode of criminal history. In other words, Eddie Kucharaki was not on probation at the time that he committed the offense EXCEPT for the check that was issued in 2000 and, EXCEPT offense (6) indicated on the Presentence Report which was committed in 2002. Eddie Kucharaki is now being treated for his bipolar illness with medication from a psychiatrist at LDS Hospital. He also receives counseling on a monthly basis. He has remarried and has two children with his current wife. In the event that Eddie Kucharaki is required to serve any significant time in jail or prison, his current wife and children will have no way to pay for their

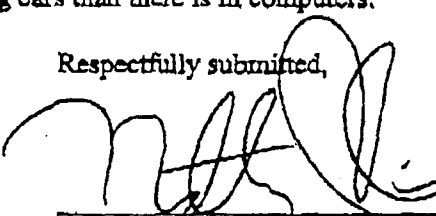
needs.

16. With respect to the "VICTIM IMPACT STATEMENT AND RESTITUTION" on page 6 of the Presentence Report, once again, Eddie Kucharski is sorry that the Hansens lost their money. He is sorry that he did not keep the deposit that they paid him so that he could pay it back to them. He did believe that he was going to be able to accomplish the work for them but he was wrong. He has spoke with Lanny Hansen who has indicated that Lanny Hansen has no ill feelings towards Eddie Kucharski and that Lanny Hansen does not want to see Eddie Kucharski incarcerated for another period of time.

17. With respect to the third to the last full paragraph, second sentence, on page 7 of the Presentence Report, it is indicated "The defendant also works for H&K Motor Sports in their public relations office." Eddie Kucharski owns H&K Motor Sports. Similarly, sentence 4 of the same paragraph it states "From 1997 until 2004, the defendant was employed with Computex as a Sales Representative." Eddie Kucharski owned Computex and was not just a Sales Representative. Eddie Kucharski was making approximately \$100,000.00 per year when he owned Computex, but he did dissolve the company to start a career in racing cars. He believed at the time and continues to believe that there is much more money involved in racing cars than there is in computers.

DATED: February 28, 2007

Respectfully submitted,

  
\_\_\_\_\_  
Nathan N. Jardine  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

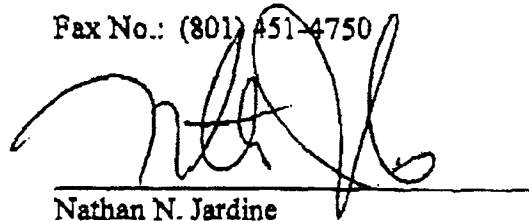
The undersigned hereby certifies that on the February 28, 2007, a true and correct copy of the foregoing Objection to Presentence Report was served by facsimile and United States First Class Mail, postage prepaid, addressed to the following:

Richard L. Larsen, Esq.  
Davis County Prosecutor  
800 West State Street  
P.O. Box 618  
Farmington, Utah 84025

Fax: (801) 451-4328

Lee Kenney, Investigator  
Blake Beesley, Supervisor  
Adult Probation and Parole  
Farmington A. P. & P.  
883 West 100 North  
Farmington, UT 84025

Fax No.: (801) 451-4750



Nathan N. Jardine

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Tab B

OCT 16 2009

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20070392-CA
v.	)	
	)	F I L E D
Eddie G. Kucharski,	)	(October 16, 2009)
	)	
Defendant and Appellant.	)	2009 UT App 295

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Second District, Farmington Department, 041701630  
The Honorable Thomas L. Kay

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant  
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City,  
for Appellee

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Before Judges Greenwood, Bench, and Davis.

PER CURIAM:

Eddie G. Kucharski appeals his conviction for communications fraud arguing that (1) the district court erred in denying his motion to withdraw his guilty plea, (2) the district court erred by failing to resolve alleged inaccuracies in the presentence investigation report, and (3) trial counsel was ineffective for failing to insure that the district court resolved the alleged inaccuracies in the presentence investigation report.

Kucharski first asserts that the district court erred in denying his motion to withdraw his guilty plea. Under Utah Code section 77-13-6(2), a guilty plea can be withdrawn only if it was "not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2) (2008). In determining whether a plea is knowingly and voluntarily made, a trial court must apply a subjective standard that examines whether the particular defendant entered his plea knowingly and voluntarily, as opposed to an objective test that would look at what a reasonable person would have done. See generally State v. Humphrey, 2003 UT App 333, ¶ 12, 79 P.3d 960.

Kucharski alleges that the district court improperly applied an objective standard in determining whether his plea was knowingly and voluntarily made rather than a subjective standard.

After reviewing the district court's ruling, it is clear that when the district court indicated that it would be untenable to use a subjective standard, it was not referring to whether Kucharski's actions should be reviewed under a reasonable person standard as opposed to an analysis based solely upon Kucharski's impressions. Instead, the district court was discussing how to view Kucharski's testimony that his plea was not voluntarily made when he expressly stated at the time he entered his plea that his plea was knowingly and voluntarily made. Contrary to Kucharski's arguments, the record demonstrates that the district court did review Kucharski's claims under a subjective standard. Specifically, in making its ruling the district court stated that it did not find a basis "in the testimony[,] or in the videotape[,] or in the record to indicate" that the plea was not knowingly and voluntarily made. Thus, the district court reviewed all available evidence, including Kucharski's attitude and reactions during the plea, before denying the motion to withdraw the plea. Under these circumstances, it is clear that the district court applied the appropriate standard in reviewing Kucharski's claim that his plea was not knowingly and voluntarily made.


Kucharski next argues that the district court erred in failing to resolve alleged inaccuracies in the presentence investigation report. The State concedes that the district court failed to comply with Utah Code section 77-18-1(6)(a) by not resolving the alleged inaccuracies on the record. See id. § 77-18-1(6)(a) (2008).

In State v. Maroney, 2004 UT App 206, 94 P.3d 295, we held that the district court erred in failing to resolve Maroney's objections to the sentencing reports, and we remanded to allow the court to resolve the objections on the record. See id. ¶ 31. We went on to state that "[i]f resolution of the objections affects the trial court's view of the appropriate sentence, the trial court may then revise the sentence accordingly." Id. This disposition is appropriate in the present case because Kucharski alleges that he was prejudiced by the failure to resolve the alleged inaccuracies in the report. Allowing the district court to revisit the sentences after resolving the alleged inaccuracies in the presentence investigation report gives appropriate deference to the district court's sentencing function. Accordingly, we remand the case so "the sentencing judge can consider the objections to the presentence report, make findings on the record as to whether the information objected to is accurate, and determine on the record whether that information is relevant to sentencing." State v. Jaeger, 1999 UT 1, ¶ 44, 973 P.2d 404. After resolving the alleged inaccuracies in the presentence investigation report, the district court may revise the sentence as it deems appropriate. Our disposition makes it

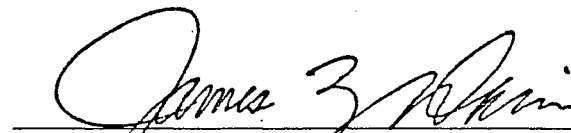


unnecessary to consider alternative arguments alleging ineffective assistance of trial counsel.

Affirmed in part and remanded.

  
Pamela T. Greenwood,  
Presiding Judge

  
Russell W. Bench, Judge

  
James L. Davis, Judge

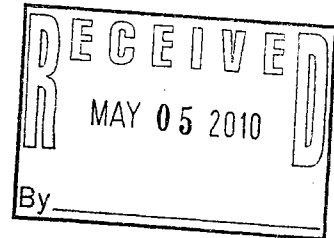
Tab C

**FILED**

MAY - 4 2010

SECOND  
DISTRICT COURT

SECOND JUDICIAL DISTRICT COURT  
FOR DAVIS COUNTY, STATE OF UTAH  
FARMINGTON DEPARTMENT



STATE OF UTAH,

PLAINTIFF,

VS.

EDDIE G. KUCHARSKI,

DEFENDANT.

Case No. 041701630

SENTENCE REVIEW

BEFORE THE HONORABLE THOMAS L. KAY

FARMINGTON COURTHOUSE  
800 WEST STATE STREET  
FARMINGTON, UTAH 84025

MARCH 4, 2010

FILED  
UTAH APPELLATE COURTS

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A P P E A R A N C E S

FOR THE PLAINTIFF:

Brandon L. Poll, Esq.  
Davis County Attorney's Office  
800 West State Street  
Farmington, Utah 84025

FOR THE DEFENDANT:

Julie George, Esq.  
Attorney at Law  
29 State Street, #007  
Salt Lake City, Utah 84111

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March 4, 2010

P R O C E E D I N G S

\* \* \*

MS. GEORGE: If you could call the State of Utah versus Kucharski, your Honor.

THE COURT: Okay. State of Utah vs. Eddie G. Kucharski. It's matter No. 33. This was set for a sentence review. Have the two attorneys ever got together to discuss this matter?

MS. GEORGE: Your Honor, we tried. What Mr. Kucharski had proposed is that rather than go forward with the full resentencing hearing, that if the court would consider having him on court probation once he paid off all of his restitution, and then he would abide by whatever rules the court set forth. If we could do it that way.

It sounds like the county attorney office is not in agreement with that --

THE COURT: Well, how can I do that if he's already on parole?

MS. GEORGE: Well, that was the issue, your Honor. He believes that the way the court ruled on the appellate decision that he's set to be resentenced in its entirety. And if that is the case, we would like to address the court on putting him on probation versus sentencing him to prison or supervise --

1 THE COURT: No, the only thing that happened on here  
2 I've read the decision several times from the Utah Court of  
3 Appeals. It just indicated that there's no evidence in the  
4 record that the objections or alleged inaccuracies in the  
5 presentence report were ruled upon. And then if they are ruled  
6 -- it says, We accordingly, we remand the case so the  
7 sentencing judge can consider the objections, make findings on  
8 the record as to whether the information objected to is  
9 accurate and determine on the record whether the information is  
10 relevant to sentencing.

11 So that's what it says. Then after resolving the  
12 alleged inaccuracies, the District Court may revise the  
13 sentences if it deems appropriate.

14 MS. GEORGE: And I think then that, your Honor, that  
15 would be -- that's what you would be asking for is to revise  
16 the sentence. What he is seeking is not to be on AP&P  
17 supervision. He met with me and we discussed what had been  
18 happening. He's been having several concerns with them and how  
19 things are being handled. And he believes at this point if he  
20 could pay off restitution, he could set forth strict guidelines  
21 for court probation rather than having to check in with AP&P.  
22 And he'd ask the court to consider that as an option.

23 THE COURT: Okay. What's the County's position?

24 MR. POLL: Your Honor, our position is that just as  
25 the court indicated, that we're back here for resentencing with

1 the court to make those findings regarding those issues that  
2 were raised and then have the defendant resentenced. He's on  
3 parole now.

4 From the State's point of view, one of two things  
5 would need to happen, either he's -- we would be recommending  
6 that he be sentenced to the Utah State Prison zero to five,  
7 give him credit for the time he served, and be put on parole.  
8 But that may require that he be taken down through the prison  
9 again and go through that booking process and then probably  
10 just release him back on parole.

11 The other option is that he be resentenced. And our  
12 recommendation would be zero to five, suspended and credit for  
13 time served and be placed on AP&P probation, and he'd have to  
14 pay his restitution. But we would like to see him on probation  
15 with AP&P given his record, given this case. We don't think  
16 that he's amenable to a probation where he's not supervised.

17 MS. GEORGE: And your Honor, in response to that, my  
18 client indicates that he is -- the concern that he has with  
19 AP&P is with the particular supervisor, Casy Nelson. What he  
20 asks is that if it's at all possible to get another officer to  
21 supervise him other than Mr. Nelson, he'd be fine with that.  
22 He's working diligently to try to get the restitution paid off.  
23 He's okay with being supervised for a year, but his concern is  
24 just that Mr. Nelson has caused some issues, one of which  
25 included losing some employment and some other things. And so

1 he'd ask if the court could make a condition of that, that it  
2 be a different officer to supervise him.

3 THE COURT: Well, you know, with all due respect, you  
4 know, Mr. Kucharski is not in any position to dictate who he  
5 is, who he is going to be supervised by or how things are going  
6 to happen. I mean, the fact of this matter is I'm more than  
7 happy to come back and you set everything else, where you set  
8 forth what the problems are in the presentence report, you come  
9 up there with people that have evidence to say that those  
10 things are or are not the facts. I will then say, make rulings  
11 on the record, what, if that's a misstatement in the  
12 presentence report or not a mistake in the presentence report,  
13 I will then determine if I have to revise the sentence.

14 MS. GEORGE: And we're prepared to do that, your  
15 Honor. We are -- he's got a list of issues that he wanted to  
16 address on the presentence report, and I can go through those  
17 paragraph by paragraph, your Honor.

18 THE COURT: Okay. Are those -- is the State ready to  
19 proceed on?

20 MR. POLL: Yes, your Honor. Are they the original or  
21 are they additional?

22 MS. GEORGE: They would be the original. There's 29  
23 errors that he had listed out, but they would be what were  
24 covered, I believe, in the prior hearing. And I can list those  
25 out, and then if the county needs to address those, we can.



1 Some of them are more procedural.

2 THE COURT: Okay, go ahead.

3 MS. GEORGE: Your Honor, on page 2, paragraph 2, he  
4 indicated that there were felony charges that had to be filed  
5 before there was an exchange of the vehicle. His concern was  
6 that he was able to provide that the truck was returned while  
7 he was in custody before charges were ever filed, and there  
8 wasn't any outstanding money owed and the charges were  
9 dismissed.

10 In reviewing that, I believe that is correct, the way  
11 Mr. Kucharski has it listed. So his concern was it leads your  
12 Honor to believe that they had to file criminal charges before  
13 he returned the motor vehicle, and that was not the case.

14 THE COURT: Okay. What's the position of the county  
15 regarding, under criminal history on page 2 what has just been  
16 addressed?

17 MR. POLL: This is regarding Menlove; is that  
18 correct?

19 THE DEFENDANT: No.

20 MR. POLL: The vehicle with Menlove.

21 THE DEFENDANT: No, this was back in 2006.

22 MS. GEORGE: This is page 2, paragraph 2.

23 THE COURT: Well, it's 2007 it says.

24 THE DEFENDANT: It was filed in --

25 MR. POLL: Okay. I'm on it.

1 THE COURT: It's the last sentence under criminal  
2 history.

3 MR. POLL: And if that's a matter, your Honor, that  
4 was never dealt with criminally, or if it was dismissed, the  
5 State would have no objection to that not being considered in  
6 part of the presentence investigation.

7 THE COURT: Okay. Then I'm going to delete that last  
8 sentence is that agreeable?

9 MS. GEORGE: Yes, your Honor.

10 THE COURT: Or the last two sentences.

11 MS. GEORGE: Yes, your Honor.

12 THE COURT: And I'm putting my -- okay.

13 MS. GEORGE: And then on paragraph 3, your Honor, it  
14 indicates -- he claims to have returned the deposit in the  
15 statement of the offense. It also claims that he met with the  
16 victim and tried to work out a solution.

17 THE COURT: Which?

18 MS. GEORGE: I'm sorry, page 2, paragraph 3.

19 THE COURT: The attitude orientation?

20 MS. GEORGE: Yes.

21 THE COURT: Okay. What sentence?

22 MS. GEORGE: Your Honor, it says in here that  
23 Mr. Kucharski claims to have returned the deposit in his  
24 statement of the offense. So where he wrote to the court  
25 regarding his statement of what occurred and claimed that he

1 met with the victim and tried to work out a solution. The  
2 report states the defendant actually tries to absolve himself  
3 from full responsibility by placing the blame on the manager,  
4 that he never submitted the work order for the windows and  
5 insisted the victim issue the checks directly to himself.

6 Your Honor, the fact is that Mr. Kucharski met with  
7 the victim's attorney, Nathaniel Ashcraft, he's in Sandy, Utah.  
8 And what had happened is the manager of Mr. Kucharski at  
9 Champion Window authorized Mr. Kucharski to do sides jobs as  
10 they are referred to as long as Mr. Kucharski --

11 THE COURT: Didn't we have the manager here at some  
12 point and he said exactly the opposite? I don't know what he's  
13 done with his attorney, but I remember this exactly as though  
14 it were yesterday. Mr. Kucharski came up and said something  
15 and the other person who was there said exactly the opposite.

16 THE DEFENDANT: Mr. Arrington, your Honor.

17 THE COURT: Pardon?

18 THE DEFENDANT: Mr. Arrington.

19 THE COURT: No, I'm not talking about the attorney.  
20 I'm talking about -- we had somebody here from the window  
21 company.

22 MS. GEORGE: From Champion Windows.

23 UNKNOWN SPEAKER: Your Honor, if I might interrupt.  
24 I was involved with the Champion Window. That is my  
25 recollection was that when he had met with the attorney may

1 have been one thing, but I know the manager, at least in my  
2 recollection, had always insisted exactly what his statement in  
3 that presentence report was.

4 MS. GEORGE: Yeah, and what, what we're referring to  
5 is the manager that was supervising Mr. Kucharski. At the time  
6 Mr. Kucharski came before your Honor for sentencing that  
7 individual, that manager that had supervised my client was  
8 gone. And that's not who was supervising Mr. Kucharski at the  
9 time.

10 And so what my client is saying, what Mr. Kucharski  
11 is saying at this point, is at the time he did the windows, his  
12 supervising manager at that time allowed him to do sides jobs.  
13 And that's how the situation worked out. The gentleman who  
14 would have come to the sentencing hearing, the last sentence  
15 and talked was not the individual who was involved with  
16 Mr. Kucharski at the time. He was someone new.

17 THE COURT: What's the County's position regarding  
18 that response?

19 MR. POLL: Your Honor, you've -- I think you have  
20 heard the explanation from the county and from the defendant.  
21 So we just ask the court to make whatever finding you feel is  
22 appropriate for those claims.

23 THE COURT: Okay. Based upon both what happened at  
24 the time previously, at the previous sentence and at the  
25 corrections that were pointed out right now and were pointed

1 out then, I'm not making any changes because I do not believe  
2 the facts are as Mr. Kucharski says. I believe they are as  
3 stated under the issue of attitude orientation is what was said  
4 at the time of sentencing by the victim in the case.

5 (Counsel conferring with Defendant.)

6 MS. GEORGE: So what Mr. Kucharski is saying, your  
7 Honor, is that there were two jobs that he was working on. One  
8 which was for patio work and one which was for the windows.  
9 When -- when he was told that the windows would not be  
10 completed and that there were issues, he did return the one  
11 check which was for the patio work and that the window's check  
12 was not returned -- two different customers. His concern is  
13 that he did indeed return a check for one of these side jobs,  
14 but it looks as though he's lying about returning the check for  
15 the windows.

16 And what he is saying, your Honor, is I've never said  
17 I returned the check for the windows. That I did not do. It  
18 was for the other side job. So I think what they've done is  
19 taken two separate work situations and combined them as one.  
20 And what Mr. Kucharski is saying is for the second incident, he  
21 did return that check, he didn't return it for the windows.

22 So the facts are the same, meaning the people for the  
23 windows have never had their check returned, but Mr. Kucharski  
24 is just concerned that it places sort of a taint that he's  
25 being evasive or dishonest before the court and he wants that,

1 that issue corrected.

2 THE COURT: Okay. You still talking about the  
3 attitude orientation paragraph?

4 MS. GEORGE: Yes, your Honor.

5 THE COURT: Well, I'm going to tell you, counsel, and  
6 I don't have any disrespect for you, but I can tell you that  
7 we've been through this. I've had Mr. Kucharski on a case  
8 before this case, and I've had more stories that I have heard  
9 that he has been rebutted by a bunch of other people that he's  
10 plead guilty to and then he comes back and gets a new attorney  
11 and then he basically says all the same old stories again.

12 MS. GEORGE: Yes, your Honor.

13 THE COURT: And so if you want to go through all  
14 these this way, I'm more than happy to do it, but I made my  
15 ruling on that. I'm required to make the finding. I made a  
16 finding and I'm not going to have things reargued.

17 MS. GEORGE: And I understand that, your Honor. My  
18 concern is just then I'm put in a position as his current  
19 counsel where Mr. Kucharski wanted these issues addressed. If  
20 I don't address them then I too am --

21 THE COURT: I'm not faulting you for addressing them.  
22 I'm just telling you what's the history.

23 MS. GEORGE: Yes, your Honor.

24 THE COURT: -- of this case and previous cases.

25 MS. GEORGE: Yes, your Honor.

1           The second -- excuse me, the third issue that  
2 Mr. Kucharski then just wanted to address with the court would  
3 be that on page 2, paragraph 4, it said he was placed on six  
4 consecutive periods of supervision. He just wanted it  
5 clarified that all of those periods stems from one series of  
6 bad checks.

7           THE COURT: Okay. Which page?

8           MS. GEORGE: That would be page 2, paragraph 4.

9           THE COURT: Okay. And what did you say?

10          MS. GEORGE: Where it has investigator --

11          THE COURT: Six periods.

12          MS. GEORGE: Yeah. Investigator comment there, that  
13 second sentence, it says he's been placed on six consecutive  
14 hearings of supervision. Mr. Kucharski's concern was that the  
15 criminal activity stemmed from one period of criminal activity  
16 and that it looks as though he had several series of that. And  
17 he did successfully complete that. And he said that's not  
18 reflected in there either.

19          THE COURT: Okay. What's the position of the County  
20 as to that statement? This is under investigator comment, the  
21 first paragraph.

22          MR. POLL: Yes. I have no objection if the court  
23 wants to consider the fact that he, that the six consecutive  
24 periods of supervision were the result of a long-term crime  
25 spree.

1 THE COURT: Okay. As -- so end the second sentence  
2 to say, periods of supervision as a result of one, one -- how  
3 do you want to phrase that? Longer criminal episode?

4 MS. GEORGE: Yes, your Honor.

5 THE COURT: Okay. Then I'm going to say add to the  
6 paragraph, or add to the sentence, six consecutive periods of  
7 supervision as a result of one longer episode, period. And  
8 then where do you want to have him saying that he completed  
9 that successfully?

10 MS. GEORGE: We could just put that right after that  
11 sentence, your Honor.

12 THE COURT: Okay. Is there any objection to that  
13 from the counsel for the State?

14 MR. POLL: I'm trying to find the -- if defense  
15 counsel could point to somewhere, indicates where it was  
16 successful.

17 THE DEFENDANT: That's completion. That's not here  
18 at all. That's the problem. That was the issue.

19 MS. GEORGE: It was information that he believes AP&P  
20 possessed but failed to put in the report.

21 MR. POLL: I have no objection.

22 THE COURT: Okay. I'll put he completed discover --  
23 excuse me, supervision successfully after the --

24 MR. POLL: No objection, your Honor.

25 THE COURT: -- after the no longer episode.



1 MS. GEORGE: And what he's concerned then is that  
2 last sentence in that same section, in investigator comment,  
3 where it says, he's simply not conducive to supervision and  
4 lesser restrictive setting than prison.

5 I realize at this point where he's been to prison, it  
6 makes the sentence essentially moot, but his concern is that it  
7 looks as if prison was the only alternative based on his lack  
8 of compliance for earlier probations. So that is one of the  
9 situations where he's already been to prison. It doesn't make  
10 a difference as far as what your Honor would sentence him to at  
11 this point. He just wants it noted that he believes that  
12 sentence is put in there based on the earlier sentence that he  
13 had six separate periods of supervision.

14 THE COURT: Well, okay. How does he know it's that  
15 versus the sentence just before that?

16 MS. GEORGE: And I don't believe that he would, your  
17 Honor. I guess maybe clarification from the court of what you  
18 would be relying on would be sentence one and not sentence two  
19 of the second paragraph?

20 THE COURT: No, I basically think the sentence that  
21 says the defendant has established instances of repetitive  
22 criminal contact and continued criminal behavior subsequent to  
23 arrest, I think that was a big, big, big issue.

24 MS. GEORGE: Okay. So the court's indicating it  
25 wasn't necessarily sentence two that the court relied on for

1 prison?

2 THE COURT: No.

3 MS. GEORGE: So that would take care of that issue.

4 The other issue he had was page 3, paragraph 1 which  
5 would be regarding how the checks were made out. We've covered  
6 that already, your Honor, that there were two separate  
7 instances of work, and I provided that to the court.

8 And I believe in going through the documentation of  
9 what I've been able to find from the earlier case that this  
10 information was provided verbally to the court. It was not in  
11 the presentence report as a written comment, but it was  
12 verbally provided to the court.

13 THE COURT: Okay. So what do you wish to have happen  
14 on that?

15 MS. GEORGE: Your Honor, what he provides to me today  
16 is the Champion Window's letter that he has, two different  
17 managers, Sasha Strands, the office manager. This was written  
18 on March 1st, 2007. So I'm not sure if this was provided to  
19 the court before -- oh, it was faxed here. That he had --

20 THE COURT: It was faxed to where?

21 MS. GEORGE: To the court. He indicates if I  
22 could --

23 THE DEFENDANT: The Clerk's -- Clerk's Office over  
24 here. The day of sentencing he didn't know anything about  
25 this. And I asked, I called over to them and asked them to

1 provide this information which is available to Mr. Arrington at  
2 the original time but never presented. The manager that was  
3 ultimately let go from Champion Windows who authorized me to do  
4 the side job, claimed that I moved to Texas or possibly Arizona  
5 which was claimed, you know, the factual statement; when the  
6 truth is I was transferred to the Dallas Office, still working  
7 for Champion. I was not running; I was not hiding. And these  
8 letters clarify that.

9 THE COURT: So where do you want these letters going  
10 into, which paragraphs?

11 MS. GEORGE: I think what we could do is just, if we  
12 could correct, and again, for the record, for Mr. Kucharski's  
13 sake as well, the manager could tell anyone anything and there  
14 isn't any way to prove that differently, but what Mr. Kucharski  
15 is saying is he didn't move to Arizona as it states in  
16 paragraph 2. He was transferred by the corporation, the  
17 company to the Texas office.

18 And so perhaps what we could do is after paragraph 2,  
19 we could just put a sentence in there that states,  
20 Mr. Kucharski was transferred by Champion Window to the Texas  
21 office.

22 THE COURT: Okay. I'm crossing out possibly to  
23 Arizona, and just say moved, transferred to the Dallas, Texas  
24 office, period.

25 MS. GEORGE: Okay. And what Mr. Kucharski is now

1 saying, your Honor, is that the he believes the way it was  
2 listed showed an intent to defraud by fleeing the State for  
3 prosecution. Again, I think those letters then disprove that,  
4 that he was transferred by the company itself.

5 THE COURT: Okay.

6 MS. GEORGE: Mr. Kucharski is stating that the victim  
7 in this case where the Champion Windows went back to Champion  
8 Windows and tried to talk to the manager who came to court  
9 here, and that manager threw the victim out of their office.  
10 So I don't know that that's relevant other than to just let the  
11 court know even the victim had tried to resolve this issue and  
12 it wasn't something Champion was willing to do at that time.  
13 So that takes care of page 3, paragraph 1 and 2 corrections.

14 And then, your Honor, the next issue that my client  
15 had was that the report said there were 52 days served and  
16 there were actually 75 they served incarceration. Again, I  
17 think that issue might be moot at this point --

18 THE COURT: Well, was that raised at the time?

19 THE DEFENDANT: Yes, I believe it was.

20 MR. POLL: The State would have no objection to him  
21 receiving credit for 75 --

22 THE COURT: I'm putting after serving 75 days under  
23 E, custody status.

24 MS. GEORGE: And then, your Honor, the next issue --

25 THE COURT: And I will say 23 days didn't make a big

1 difference in what the sentence was.

2 MS. GEORGE: Your Honor, the other issue that he had  
3 is that in the listing of criminal history, that information  
4 included not only cases that were dismissed, but something that  
5 was such, of such a nature such as licensing a dog, and his  
6 concern was that AP&P was trying to sort of load the report  
7 with information that was negative --

8 THE COURT: Well, is it wrong that he failed to  
9 license his dog or he had an animal at large in a Class C  
10 misdemeanor or is it just that it looks bad?

11 MS. GEORGE: It's clearly a violation of the law, and  
12 AP&P puts all of those in there. I think --

13 THE COURT: Well, I'm asking is it true or is it not  
14 true? And he had to pay a fine?

15 THE DEFENDANT: Yes, had to pay a fine, yes, sir.

16 THE COURT: Okay. Then what, what is the reason to  
17 take that out if it's a Class C misdemeanor?

18 THE DEFENDANT: I was told in 1999 it would actually  
19 be removed from my record if I paid the fine. So it was  
20 actually my ex-wife's dog. It wasn't even my dog. I was the  
21 one home, and that's why I got the ticket.

22 THE COURT: Well, if anybody believes that I sent you  
23 to prison because you failed to license your dog or had an  
24 animal at large, a Class C misdemeanor, that you paid a fine  
25 late in 1999, it had nothing to do at all with what I did.

1 THE DEFENDANT: Your Honor, it's not much that point;  
2 it's the point the dismissed cases are still on here. Those  
3 kind of things.

4 THE COURT: I don't -- when I see dismissed cases on  
5 there, I don't think about them.

6 THE DEFENDANT: You may not, but the board does. The  
7 board uses these two to determine what I am going to do down at  
8 the prison.

9 MS. GEORGE: Your Honor, as a matter of course, I  
10 believe that presentence reports always include matters  
11 dismissed or those that actually went to trial and were  
12 acquitted and those that are actually settled by conviction. I  
13 think it was just Mr. Kucharski's concern that it lent an  
14 errand that he had many more criminal cases than what he'd  
15 actually done.

16 THE COURT: All right.

17 MS. GEORGE: And your Honor, the next issue that he  
18 had was that in the life section it listed that he's --

19 THE COURT: Which page?

20 MS. GEORGE: In the -- it's page 7.

21 THE COURT: Yes.

22 MS. GEORGE: And it would be the last sentence of the  
23 first paragraph. His concern again, your Honor, this is just  
24 the way the report is drafted, that it states he claims to have  
25 suffered from migraines. He indicates that he's been diagnosed

1 with those, and that information was provided --

2 THE COURT: Okay. Which paragraph?

3 MS. GEORGE: It would be paragraph 1, the last  
4 sentence. His concern --

5 THE COURT: He claims he's suffered, he's been  
6 diagnosed?

7 MS. GEORGE: Yes.

8 THE COURT: Instead to have claimed to have suffered?

9 MS. GEORGE: Yes, your Honor.

10 THE COURT: Diagnosed with? Okay.

11 MS. GEORGE: By muscular migraines, yes.

12 THE COURT: All right. That's been changed.

13 MS. GEORGE: And then in the employment section --

14 THE COURT: Yes.

15 MS. GEORGE: -- it's stated that he studied diesel  
16 mechanics and he indicates that what he actually did was  
17 complete a two-year course for diesel mechanics.

18 THE COURT: So for approximately two years?

19 THE DEFENDANT: No, that's only 10 months. I did the  
20 program in only 10 months.

21 THE COURT: Well, so it's accurate, you studied it  
22 for a year. Is that correct?

23 THE DEFENDANT: Graduated the program.

24 MS. GEORGE: So that might be the way to resolve it  
25 and put graduated.

1 THE COURT: And graduated. Okay. That's been  
2 changed.

3 MS. GEORGE: And then where it says, second  
4 paragraph, Defendant works for H&K Motor Sports, he owns that.  
5 So if we could have that changed to the defendant owns H&K  
6 Motor Sports.

7 THE COURT: Any objection to that change?

8 MR. POLL: No, your Honor.

9 THE COURT: Okay. It's changed.

10 MS. GEORGE: Okay. And then it says, employed by  
11 Computex. If you go to the next sentence, he owns Computex, or  
12 owned Computex.

13 MR. POLL: No objection to that being changed.

14 THE COURT: Okay. Well, how do you want to say it?  
15 Says he was employed as a sales representative.

16 THE DEFENDANT: I was the owner, so --

17 THE COURT: So from 1997 until 2004 --

18 MS. GEORGE: The defendant owned Computex.

19 THE COURT: Okay. Period?

20 MS. GEORGE: Period, yes.

21 THE COURT: Then I've changed that.

22 MS. GEORGE: And then the final thing on that  
23 paragraph it states, although he claims he was earning 100,000  
24 a year, he quit the job in his desire to race cars. His  
25 response to that, your Honor, is that he did not quit the job



1 to race cars, he had just started a new company, H&K, to have  
2 race cars. I'm not sure how your Honor would want to address  
3 that.

4 THE COURT: Okay. Are you saying he -- did he quit a  
5 job that was paying 100,000 a year?

6 MS. GEORGE: He sold Computex, your Honor, yes, and  
7 then started H&K Motor Sports.

8 THE DEFENDANT: And just to clarify, the reason  
9 behind my concern with these points is because not just to show  
10 that -- since it will affect me, but it affects my employees.  
11 And that was the concern here originally. These employees all  
12 had to be let go and those kind of things.

13 THE COURT: What's the response to the State on that  
14 last sentence under education of employment financial  
15 information?

16 MR. POLL: I -- your Honor, if they could repeat how  
17 they wanted that changed. This is the very last sentence where  
18 he claims he was earning 100,000 a year. He quit his job for  
19 his desire to race cars. How do you want --

20 THE DEFENDANT: I'm okay with just removing that  
21 entire last sentence all together.

22 THE COURT: Is there any objection to that?

23 MR. POLL: No, your Honor.

24 THE DEFENDANT: And in fixing the other ones to show  
25 I was the owner.

1 THE COURT: Okay. It's released. I got owners on  
2 the two H&K and Computex. And the last line has been  
3 eliminated.

4 MS. GEORGE: And then, your Honor, the final thing  
5 would be on the mitigating circumstances page after  
6 aggravating, what Mr. Kucharski's concern is, is that there  
7 were aggravating circumstances checked in the original  
8 presentence report, but he doesn't believe that any were  
9 addressed for mitigation.

10 THE COURT: Okay, and what do you claim they should  
11 be?

12 MS. GEORGE: One, your Honor, that the offender's  
13 criminal conduct neither caused or threatened serious harm.

14 THE COURT: Okay. What's the State's response?

15 MR. POLL: The State would agree that no physical  
16 harm, your Honor.

17 THE COURT: Okay. Well, I'm going to put serious  
18 physical harm there and put a check in that box.

19 MS. GEORGE: And then that No. 6, your Honor,  
20 restitution would have been severely compromised by  
21 incarceration. He went to prison, so I'm not sure how to  
22 address that. But he believes the issue should have been  
23 addressed by counsel he had at the time.

24 THE COURT: Okay. Well, we're not here to do that.

25 MS. GEORGE: And your Honor --

1 THE COURT: Because they've said because our  
2 disposition makes it unnecessary to consider alternative  
3 arguments alleging ineffective assistance of trial counsel. So  
4 I'm only going to do what I have to do. I don't have to do  
5 that.

6 MS. GEORGE: So that one we'll list as moot.

7 And then seven, your Honor, may well be moot as well  
8 because he's gone to prison. So when it talks about the  
9 amenability to supervision, he's already been to prison. So  
10 seven --

11 THE COURT: But were these things brought up at the  
12 time? Were these things brought up or brought up to his  
13 counsel and not brought up to me, is that what happened?

14 MS. GEORGE: I would have him address the court  
15 because I don't know, your Honor.

16 THE DEFENDANT: Again, it's been over three years  
17 since sentencing. So it's hard for me to, you know, remember  
18 verbatim exactly each one of these points that were not  
19 handled. I told my attorney at the time these are the  
20 inaccuracies. And I understand what you just said, that we're  
21 not here to address, you know, improper counsel.

22 THE COURT: Yes.

23 THE DEFENDANT: I agree. But what the Court of  
24 Appeals did say was the errors in the PSI need to be addressed.  
25 And these are errors. Whether he addressed them or not, at

1 this point the Court of Appeals has determined that these need  
2 to be addressed.

3 THE COURT: But I'm just to address the alleged  
4 inaccuracies that were set at the time of sentencing. I'm  
5 not -- that's why I am asking if these were brought up at the  
6 time of sentencing because I can't -- I only have to resolve  
7 alleged inaccuracies that were done at the time of sentencing.

8 THE DEFENDANT: There was a laundry list. I  
9 apologize. I don't remember exactly which ones that were  
10 detailed by Mr. Jardine.

11 MS. GEORGE: And perhaps the way to remedy that would  
12 be to just state that Mr. Kucharski has indicated that  
13 mitigating circumstances No. 1, 6, 7, 8, 9, 10, 12, and 14  
14 should have been addressed because and they may have persuaded  
15 your Honor not to send him to prison. They all address whether  
16 prison was an appropriate sentence or not. Again, that would  
17 go to that ineffective assistance of counsel claim, and I  
18 realize we are not here to address that.

19 THE COURT: Okay, what is the County's position of  
20 that statement?

21 MR. POLL: Well, with regard to what was addressed  
22 and what wasn't addressed, I mean, it would seem to me like the  
23 things we should be addressing are laid out in Mr. Jardine's  
24 objection of the presentence report. And if they are not laid  
25 out there, many of these things may be brought up now for the

1 first time for --

2 THE COURT: Okay. And are you saying they were  
3 brought up there on as it relates to 1, 6, 7, 8, 9, 10, 12, and  
4 14 of mitigating circumstances?

5 MR. POLL: I'm not seeing it in their original  
6 objection, but if you could give me the numbers again.

7 THE COURT: One, 6, 7 through 10, 12 and 14.

8 MR. POLL: Okay. Your Honor, if I can just quickly  
9 address them. We already addressed Count I, No. 1.

10 THE COURT: Right.

11 MR. POLL: No. 6 is really a speculative statement,  
12 and I think the court has already heard, and we just ask the  
13 court to consider the defendant's statements regarding whether  
14 restitution would be severely compromised by incarceration.  
15 The State would argue based upon defendant's history that -- I  
16 mean, it's just speculation on whether or not he would have  
17 paid restitution had he been out other than the fact that he's  
18 ordered too.

19 THE COURT: Okay. Before you start there, I'm just  
20 asking if these things were not in Mr. Jardine's objection to  
21 the presentence report, is it your memory or not that these  
22 were included or discussed, these mitigation circumstances.  
23 That was my question.

24 MR. POLL: I wasn't present at that hearing, your  
25 Honor. I don't have recollection, but --

1 MS. GEORGE: And your Honor --

2 MR. POLL: I understand the reason why we are here is  
3 to address those things that were brought up --

4 THE COURT: And had to be resolved.

5 MR. POLL: -- and had to be resolved, not things that  
6 we've now since three years later --

7 THE COURT: That's correct.

8 MR. POLL: -- come up with.

9 THE COURT: No, that's right.

10 MR. POLL: And --

11 MS. GEORGE: Mr. Kucharski indicates that he had a  
12 check for full restitution that he brought to court that day.  
13 So I don't know if that was brought to the court's attention or  
14 not.

15 THE DEFENDANT: It was.

16 MS. GEORGE: And I don't know how that would play  
17 into that. I just wanted that on the record, that he indicated  
18 he had been prepared to paid that at the time and when  
19 sentenced to prison then the family used that money instead to  
20 take care of his wife and children while he was incarcerated.

21 THE COURT: Okay. I'm a little confused.

22 Mr. Kucharski has been saying it was Mr. Arrington and now it  
23 wasn't Mr. Arrington at all, it was Mr. Jardine.

24 THE DEFENDANT: I had two others. I filed a  
25 complaint against Mr. Arrington and that's the hearing we had

1 where back and forth --

2 THE COURT: Okay, but then did you have Mr. Jardine?

3 THE DEFENDANT: Yes.

4 THE COURT: And how many items were in his objection  
5 there?

6 MR. POLL: Seventeen paragraphs. I take them to be  
7 items.

8 THE COURT: Okay.

9 MR. POLL: It's my understanding that this is what  
10 was presented at sentencing, correct? The subsection --

11 THE DEFENDANT: He submitted it, it wasn't addressed  
12 on the record which is why we are here now.

13 MR. POLL: Right. And that's my understanding. So  
14 it seems we ought to be maybe working from Mr. Jardine's.

15 THE DEFENDANT: The Attorney General's Office brought  
16 up the same argument. The Attorney General's Office originally  
17 argued certain points of this. And the (inaudible) said no,  
18 instead of just dealing with one or two or three items they all  
19 need to be readdressed.

20 MR. POLL: And I think we just need to work off of  
21 the order which --

22 THE COURT: Okay, so we get to start over, is that  
23 what you are saying? Okay. All these things we just did are  
24 not the same? Did you have reference to that?

25 MS. GEORGE: Your Honor, what I did was I took the

1 appellate order and then had Mr. Kucharski go through that.  
2 And I think at this point for judicial economy, what  
3 Mr. Kucharski and I put on the record, covers those issues. He  
4 went back through that presentence report for me. As new  
5 counsel what I would submit to the court is we've covered  
6 those.

7 THE COURT: Could I just see those for a minute,  
8 since --

9 Okay. Each of the things that you brought up so far  
10 up to the mitigating circumstances have been covered in  
11 Mr. Jardine's objection to the presentence report. So -- okay,  
12 I'll give that back to you.

13 MS. GEORGE: Your Honor --

14 THE COURT: Okay, well, as it relates to the  
15 mitigating circumstances, I'm putting those as basically  
16 ineffective assistance of counsel. I understand what the  
17 argument has been that they should have been brought, or  
18 they're brought up through counsel, but they were not brought  
19 up to me before. And they are not in that report.

20 MS. GEORGE: Yes, your Honor.

21 And then he mentioned that he had asked in the past  
22 too that the sentence be overturned on the basis that he had a  
23 plea agreement with the County Attorney's Office and that was  
24 not what the court sentenced him to. However, the law is very  
25 clear and the plea agreement is clear that the court's agreed



1 to sentence a defendant to whatever the court believes is  
2 appropriate regardless --

3 THE COURT: I believe that was brought up at the time  
4 of sentencing --

5 MS. GEORGE: Yes, and I believe --

6 THE COURT: -- and I think it was contrary to the  
7 quote, deal, that I never bound myself to follow.

8 MS. GEORGE: And I just explained to him that that is  
9 now dealt with and I cannot ask the court to revisit that  
10 issue. I just wanted the record clear that it can't be  
11 revisited.

12 THE COURT: Okay.

13 MS. GEORGE: And at this point, your Honor, we would  
14 submit if the court --

15 THE COURT: Okay, if you want to make any argument to  
16 all those changes that have been made to the presentence  
17 report, if you believe that they would have caused a different  
18 sentence to do, and I'm going to ask the State to do the same  
19 thing, if you wish to make such an argument.

20 MS. GEORGE: Yes, your Honor. What Mr. Kucharski had  
21 asked in revisiting the sentence is that he believes that the  
22 way the errors were contained in the report is that it gave the  
23 court the idea that he has had many, many years of history of  
24 defrauding people and not paying for his obligations, and that  
25 that's not the case. That he has had successful businesses as

1 what is indicated in the report. He's made money off of those.  
2 That he was transferred to Texas. He hasn't tried to flee to  
3 get away from criminal responsibility. That he has paid  
4 restitution on that other case, and that he's done everything  
5 that he could to make sure that the parties were whole.

6 And in this case he came to court with restitution  
7 money and had tried to resolve it in a way that the victims  
8 were not out money for several months, if not a year, and that  
9 he has owned up to his responsibilities. He's come to court  
10 and he's been responsible. And the issues that he raised, he  
11 believes essentially gave the court the opinion that he makes  
12 his money off of defrauding people and then flaunting the law.  
13 And that is not the situation.

14 And he is back with his family. They are dealing  
15 with medical issues with his wife and child. And he would ask  
16 the court to consider his request, not to put him on probation  
17 with AP&P or supervision or change his officer from Casy  
18 Nelson. And he would get the restitution paid as quickly as he  
19 can.

20 THE COURT: All right, the State.

21 MR. POLL: Your Honor, the defendant has led a trail  
22 of fraud, and I think essentially showing that he is a con man.  
23 This case is also a fraud case. The defendant plead guilty to  
24 that in showing once again that he is nothing but fraud.

25 He indicates that he wants to mitigate the

1 circumstances regarding allegations that he left the state.  
2 Our records indicate in December of 2005, December 8th, he  
3 failed to appear. A bench warrant was issued. We had a bail  
4 bonds hearing six months, about seven months later in July.  
5 And then August 30th of 2006, and we'd learned that he'd been  
6 arrested in Phoenix and that he was going to waive extradition.  
7 The defendant had already appeared a number of times on this  
8 case so he knew this case was pending.

9           In the objection to the presentence report filed by  
10 his attorney, Mr. Jardine, it indicates that Eddie Kucharski  
11 admits that the current wrongdoing occurred during a time he  
12 was on supervised probation, but yet today argues that he  
13 should be a candidate for probation and that any allegation or  
14 suggestion otherwise in the presentence report is improper.  
15 But yet everything we have shows that he's not a good candidate  
16 for probation.

17           I would just also indicate, your Honor, that whatever  
18 sentence is given, that the court could consider that the  
19 defendant needs to make substantial payments towards  
20 restitution if he owns companies and has had such good  
21 employment then we could expect that restitution be paid  
22 quickly.

23           Your Honor, I believe that his record of fraud, of  
24 continuing crime, of violating or have committing a crime while  
25 he was on probation and just this case itself deserves a prison

1 sentence.

2 MS. GEORGE: And, your Honor, in response --

3 THE COURT: All right, any response?

4 MS. GEORGE: Well, just that that's not what the plea  
5 agreement was. In fact, the County Attorney's office signed  
6 the plea agreement stating that they weren't recommending no  
7 prison. So Mr. Kucharski's concern is now to come back in and  
8 say that, he feels like they were bound by their obligation not  
9 to make that recommendation.

10 THE COURT: Okay. Anything further?

11 MR. POLL: Yeah, the response from the State is the  
12 fact that we're here today to discuss what was considered,  
13 whether or not the court considered that and whether things  
14 were proper to be considered for a prison sentence. Defendant  
15 has stood here today arguing various reasons why prison is  
16 inappropriate suggesting that the court acted inappropriately.  
17 It's the State's job and position to make an argument of why  
18 his arguments are flawed. So I don't believe that the original  
19 agreement of no prison stands at this point because we are at a  
20 different point in the game. We honored our agreement. And  
21 the issue that we are dealing with now is what, what was to be  
22 considered, what is to be considered now, and so I think it's  
23 appropriate for me to make those arguments.

24 THE COURT: Okay. Any last few words?

25 MS. GEORGE: Then Mr. Kucharski would ask to set

1 aside the plea on the basis that the State is not abiding by  
2 the plea agreement and would like that --

3 THE COURT: Well, that is not before me and I think  
4 that is moot. So that is not before me.

5 What is before me is a decision from the Utah Court  
6 of Appeals, dated October 16th of 2009 in the case of State of  
7 Utah versus Eddie Kucharski. And the concern that is stated on  
8 page 2 of that decision is that the alleged inaccuracies were  
9 not resolved by the District Court, that being me at the time  
10 of sentencing.

11 And so it was to be remanded to allow the court to  
12 resolve objections on the record. And the court stated, This  
13 disposition is appropriate in the present case because  
14 Kucharski alleges that he was prejudiced by the failure to  
15 resolve the alleged inaccuracies in the report allowing the  
16 District Court to revisit the sentences. After resolving the  
17 alleged inaccuracies in the presentence investigation report  
18 gives appropriate deference to the District Court sentencing  
19 function. Accordingly we remand the case so, quote, the  
20 sentencing judge can consider the objections to the presentence  
21 report, make findings on the record as to whether the  
22 information objected to is accurate, and determine on the  
23 record whether the information is relevant to sentencing.

24 So first of all, we've gone through both looking at  
25 the report of Mr. Jardine that was considered previously at the

1 hearing that were basically the same issues that Ms. George has  
2 gone through. I've made the changes where everything that was  
3 asked except the attitude and orientation paragraph and the  
4 mitigation statements that I deemed, the ineffective assistance  
5 of counsel type of claims that were not before me.

6           So the next issue is the court stated, After  
7 resolving the alleged inaccuracies that have now been done in  
8 the presentence report, the District Court may revise the  
9 sentence as it deems appropriate. And our disposition makes it  
10 unnecessary to consider alternative arguments alleged in  
11 ineffective assistance of counsel.

12           What I would say in response to what we have done  
13 today is all of these changes that you've made, even if you  
14 want to take out the attitude and orientation change, the  
15 problem with this case and the problem that I didn't go along  
16 with what the plea was, was because Mr. Kucharski had had a  
17 history with me. And that paragraph under investigator  
18 comment, the second paragraph, the first sentence, the  
19 defendant has established instances of repetitive criminal  
20 conduct and continued criminal behavior.

21           And that was the issue that was critical. And it was  
22 the issue that he was going from company to company, doing  
23 similar types of crimes, and basically thinking he could get  
24 away with it. That more than anything else -- it wasn't the  
25 dog license failure. It really wasn't anything about the --

1 other than the record that I had had with him. And despite  
2 what the recommendation was by the county or the defendant was  
3 that he deserved to go to prison because of the continued  
4 behavior. Probation hadn't changed him in the past under  
5 supervised probation, and he continued to commit crimes.

6 And so I'm stating as a matter of fact and law that  
7 all the inaccuracies that have been addressed here that I have  
8 agreed to and agreed to what Mr. Kucharski said would not and  
9 will not change the sentence that I gave him to go to zero to  
10 five years in prison. So I do not see any reason to revise the  
11 sentence because those things did not affect it.

12 Having said that he's on probation -- or he's on  
13 parole from the prison with whatever the prison does, and I  
14 don't control that anymore than I control what he does at the  
15 prison or what the jail does.

16 So I believe that resolves the matter. Is there  
17 anything else that needs to be addressed?

18 MS. GEORGE: Your Honor, just quickly for the record  
19 so Mr. Kucharski is clear on what the court is saying is that  
20 he's been to prison, and because he did not expire, meaning  
21 served his full prison sentence by being on AP&P supervision at  
22 this time, that's a condition of parole, and your Honor doesn't  
23 have jurisdiction over that. Is that correct?

24 THE COURT: That's accurate.

25 MS. GEORGE: Okay, and then the issue he wanted to

1 address was restitution.

2 THE COURT: Well, the restitution issue is addressed  
3 with AP&P and parole.

4 MS. GEORGE: If I could just quickly, the report  
5 indicates that 6300, that's what we thought it was, but for  
6 some reason that figure was changed over \$10,000 at the Utah  
7 State Prison, and I don't know why.

8 THE COURT: It's called interest.

9 THE DEFENDANT: It's not interest -- it's before the  
10 interest.

11 MS. GEORGE: So what I will do --

12 THE COURT: Well, that's something -- if there's  
13 something that's gone from the time than what we stated and  
14 what the prison states, you're going to have to work with the  
15 prison because I don't know how they didn't take what we put or  
16 what I put on the sentencing in this.

17 THE DEFENDANT: Because they went through by PSI  
18 because Champion Windows got some civilly by the victim as  
19 well. I was not -- I was originally -- my civil case was  
20 dropped. Presently in the PSI Champion Windows paid a payment  
21 to the victim. I was there -- not trying to hit me with it.  
22 So my PO --

23 THE COURT: Well, I know, but if what you are saying  
24 is that I put an amount of restitution, and now you are saying  
25 that number is higher?



1 THE DEFENDANT: \$10,414.

2 THE COURT: Okay. Well, I can only deal with what I  
3 did, and I can't change what the prison does.

4 THE DEFENDANT: I'm just asking to affirm the  
5 restitution amount. That's all I'm asking.

6 THE COURT: I'm going to -- basically whatever is in  
7 the original sentence is what I ordered.

8 MS. GEORGE: Yes, your Honor, and that would take  
9 care of it. Thank you very much, your Honor.

10 THE COURT: Okay. Thank you.

11 (The preceding proceedings were concluded.)  
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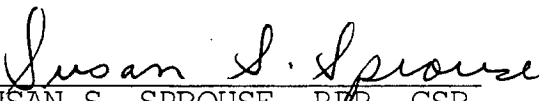
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C E R T I F I C A T E

STATE OF UTAH       )  
                              )  
COUNTY OF UTAH     )

I, Susan S. Sprouse, a Certified Shorthand Reporter,  
do hereby certify that I received the electronic recording of  
the proceedings in the matter of State of Utah vs. Eddie G.  
Kucharski, hearing date March 4, 2010, and that I transcribed  
it and that a full, true and correct transcription of said  
hearing so recorded and transcribed is set forth in the  
foregoing pages numbered 1 through 39, inclusive except where  
it is indicated that the tape recording was inaudible.

DATED this 3rd day of MAY, 2010.

  
SUSAN S. SPROUSE, RFR, CSR  
LICENSE NO. 5965543-7801

Tab D

2nd District - Farmington  
DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE REVIEW  
vs. :  
EDDIE G KUCHARSKI, : Case No: 041701630 FS  
Defendant. : Judge: THOMAS L KAY  
Custody: Bail : Date: March 4, 2010

PRESENT

Clerk: vickil  
Prosecutor: JOHNSON, MATTHEW T  
Defendant  
Defendant's Attorney(s): GEORGE, JULIE

DEFENDANT INFORMATION

Date of birth: July 27, 1977  
Audio  
Tape Number: F3 030410 Tape Count: 325 - 400

CHARGES

1. COMMUNICATIONS FRAUD (amended) - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 10/25/2005 No Contest

HEARING

Ms. George states on the record the 29 problems on the PSI.  
Mr. Poll states position of the state  
Court rules on the record  
After the PSI was corrected Court states its sentence stands.  
Sentence was not revised.

Date: March 9, 2010

THOMAS L KAY  
District Court

